FILE COPY

Numbers 402-403.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

GEORGE ASHWANDER et al., Petitioners,

v.

TENNESSEE VALLEY AUTHORITY et al.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MEMORANDUM FOR RESPONDENT CITY OF FLORENCE, ALABAMA.

W. H. MITCHELL,
City Attorney,
Solicitor for Respondent City of Florence.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Brief of Tennessee Valley Authority	3
The pleadings and trial	3
Argument	10
The final decree is erroneous in enjoining a PWA loan and grant to the City of Florence	12

Cases Cited.

Howard v. Luce, 171 Fed. 584	11
Oppenheim v. City of Florence, 155 So. 859	10
Security Savings Association v. Buchannon, 66 Fed. 799	11
Walker v. Powers, 104 U. S. 245, 26 Law Ed. 729	11
West v. Randell, Fed. Case No. 17,424	10

Numbers 402-403.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

GEORGE ASHWANDER et al., Petitioners,

v.

TENNESSEE VALLEY AUTHORITY et al.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MEMORANDUM FOR RESPONDENT CITY OF FLORENCE, ALABAMA.

OPINIONS BELOW.

The opinion of the District Court (R. 376) is reported in 9 F. Supp. 965 and its opinion on the preliminary motion to dismiss (R. 289) in 8 F. Supp. 893. The opinion of the Circuit Court of Appeals (R. 302) is reported in ... F. (2nd) ...

JURISDICTION.

The judgment sought to be reviewed was entered July 17th, 1935 (R. 311). The petition for writs of certiorari was filed August 28th, 1935. Petitioners invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the act of February 13, 1925.

QUESTIONS PRESENTED.

In No. 402:

1. Whether in the absence of fraud, duress negligence or inadequacy of consideration minority stockholders may sue to annul a contract of this corporation for a sale of properties to the Tennessee Valley Authority upon the ground that the contract is beyond constitutional powers of the authority.

2. Whether the federal government may dispose of the surplus water power necessarily created by Wilson Dam and may authorize generation of electric energy and acquisition of transmission lines as a means of facilitating this disposal.

3. Whether complainants are in this action entitled to injunctive relief suspending the City of Florence, Alabama, from entering into or performing under contract with Tennessee Valley Authority for the purchase of energy from the latter.

4. Whether complainants are entitled to injunctive relief in this action forbidding the City of Florence, Alabama, to accept or expend any loan funds received from the Tennessee Valley Authority, the Federal Administration of Public Works or other agency of the United States

for the purpose of constructing a public system for the distribution of electric power to be supplied by the Tennessee Valley Authority directly or indirectly.

In No. 403:

5. Whether in the circumstances of this case the Circuit Court of Appeals committed reversible error in sustaining the refusal of the District Court to grant a declaratory decree.

BRIEF OF TENNESSEE VALLEY AUTHORITY.

The respondent Tennessee Valley Authority has filed in opposition to the pending petition for the writ of certiorari a well-organized brief which adequately covers practically all questions which concern the City of Florence in this case. There is no occasion for repetition and the City of Florence refers to and adopts as its own the statements, arguments and citations of authorities set out in the brief of Honorable James Lawrence Fly, General Solicitor of Tennessee Valley Authority, and his associates.

THE PLEADINGS AND TRIAL.

Supplementing the statement carried in the brief of Tennessee Valley Authority the following is suggested:

Prayer for relief in the original bill is shown at pages 91 to 98 of the record. It carries twenty-seven items of relief sought. Of these items, Nos. 26 and 27 relate to the cities, and they pray for:

> 26. Injunction against contracts by the cities with Tennessee Valley Authority for distribution of power

at schedules prescribed by Tennessee Valley Authority.

27. Injunction against City defendants from aiding or abetting the Tennessee Valley Authority in making effective any of the alleged wrongs complained of in the bill.

It does not appear by the bill that the City of Florence has any contractual relationship with Alabama Power Company which is attacked or sought to be enjoined. It does not appear by the bill that defendant Cities are parties to the contracts dated January and August, 1934, between Alabama Power Company and Tennessee Valley Authority, which are by the bill alleged to be illegal and ultra vires Tennessee Valley Authority and ultra vires Alabama Power Company. The injunction decreed against defendant City of Florence is against its purchase of power from Tennessee Valley Authority, and it does not appear that such proposed purchase of power is in any way dependent upon or related to the Alabama Power Company and Tennessee Valley Authority contracts sought by the bill to be enjoined and annulled.

On the motion of the City of Florence to dismiss the bill it was seriously contended, not only that complainants as stockholders had no place in court on any part of the pending action, but that the bill is multifarious, and that the City is improperly joined as a defendant, and that separate causes of action are improperly joined. It was the theory of the City that an action (whether brought by these complainants or by Alabama Power Company itself) to enjoin an ultra vires contract between Tennessee Valley Authority and Alabama Power Company was an entirely distinct and separate and disconnected action from any cause that complainants might claim because Tennes-

see Valley Authority was in possession of Wilson Dam and distributing energy there, and proposed to sell power to the City of Florence.

The trial court overruled the motion and rendered an opinion (Rec., p. 89). The determinations of law set out in the opinions seem at variance with the conclusion of the Court in overruling the City's motion. The Court declared that complainants were entitled to nothing more than to have Alabama Power Company as a corporation free from its ultra vires contract with Tennessee Valley Authority; and yet the Court, by denying the motion of the City, held it into the lawsuit when there was no pretense on the part of complainants that the City of Florence was connected with any of the contracts sought to be annulled. The Court said:

> "The right of the plaintiffs to succeed in their suit depends on a showing that the contracts with the Alabama Power Company were ultra vires or illegal and unexecuted, and that restitution was possible. The relief accorded to the plaintiffs, suing altogether in their capacity of preferred stockholders of the Alabama Power Company, extends no further than that the corporation be freed from the obligation of the claimed ultra vires or illegal transaction with defendant the Tennessee Valley Authority, and with its codefendant and subsidiary, the Electric Home & Farm Authority, Inc. This relief would include the restraining of further execution and performance of the contracts between the Tennessee Valley Authority, the Electric Home & Farm Authority, Inc., and the Alabama Power Company. No other relief prayed for in the bill would be appropriate to plaintiffs, suing in their capacity as preferred stockholders of Alabama Power Company."

The Court further, in the same opinion (Rec., pp. 296-7), declares:

> "The plaintiffs suing solely as preferred stockholders of Alabama Power Company should be accorded only the relief that it would be entitled to if it were the plaintiff, i. e., to have the ultra vires transaction set aside, the contracts canceled and their future performances enjoined."

On January 9, 1935, the Court entered a temporary restraining order forbidding defendant municipalities to prosecute their applications for loans and grants with PWA. There are motions to dissolve the temporary restraining order, and the Court denied the motions, and an opinion was rendered on February 11, 1935 (Rec., pp. 376-87), wherein the Court changed its attitude with regard to the extent of relief that might be granted under the bill and drew away from the previously declared theory that plaintiffs on their own claims would be entitled, as a limit to their relief, to have Alabama Power Company freed from its obligation of ultra vires contracts with Tennessee Valley Authority. Among other things, the opinion declared (Rec., p. 371 et seq.):

> 1. Section 2 of the National Recovery Act authorizes loans and grants for municipal power plants, and the same is constitutional.
>
> 2. An Alabama city has authority to issue and sell its bonds for the construction of a power plant.
>
> 3. PWA is an authorized lender for this purpose.
>
> 4. The illegality, if any (in the transaction complained of by which the City will borrow from PWA and build a power plant), lies in the disability of Tennessee Valley Authority to engage in the business of creating and disposing of electric current within the

State of Alabama in a manner having no relation to any constitutional power. The question is whether this claimed illegality extends to the loan or grant of money through PWA so as to make the loan and grant illegal and subject to be restrained by private utility injured by it.

5. Lawful competition by a government agency with a private utility is no wrong, and if the doing of the business was authorized, the competition could not be restrained.

6. If the engagement by the government agency in the power business was illegal, and if the PWA had knowledge of the proposed illegal business, the PWA loan to the municipality could be restrained.

7. The right of stockholders of Alabama Power Company to restrain a PWA loan in these circumstances after demand and refusal by the company to do so would be on the same basis as that of a stockholder to restrain TVA from engagement in illegal business after demand and refusal on the part of the corporation to act.

The opinion delivered in connection with the final decree (Rec., p. 376 et seq.) took the same double attitude. The Court said (p. 377):

> "I told counsel that while the bill contained many things, the only one that I would regard would be the validity of the contract or transaction between the Alabama Power Company which the preferred stockholders are assailing and the Tennessee Valley Authority. That is to say, the contract conveying the transmission lines and making certain arrangements about the interchange of power."

Thereupon, after this limiting declaration, which was in line with the opinion declared in November in overruling

the motions to dismiss the bill, the Court proceeded to declare the power business of the Tennessee Valley Authority to be illegal; the purchase and sale contracts between Tennessee Valley Authority and the municipalities to be illegal; and to restrain energy sales between Tennessee Valley Authority and the cities; and to enjoin the cities from borrowing money from PWA and constructing power plants.

The declared theory of the Court was that Tennessee Valley Authority has the right to operate the generating facilities at Wilson Dam, and has the right to dispose of a surplus which is incidental to such operation; that the disposal of any surplus which is not incidental to the federal uses of the generating system is illegal; that under the evidence in the record the surplus of power above actual federal needs is not an incidental surplus and cannot be legally disposed of.

There was no ascertainment by the Court, and no evidence to show, what the power demands of the City of Florence would be under its Tennessee Valley Authority contract; what the incidental surplus of energy would be on a legitimate operation of the generating units under the Court's definition of legitimate operation and incidental surplus.

The expression of the Court on the matter of surplus power was made in the opinion delivered in connection with the final decree. It appears in part at page 378 of the record:

> "* * * It seems to me that the fair construction of the act might limit the right of the Tennessee Valley Authority to sell any energy that was not surplus energy, and it has that authority under the decision of the Supreme Court, as I understand it. It has a right

to sell the surplus energy defined to be the energy over and above what the Tennessee Valley Authority creates for the use of some one of its granted constitutional powers, and used for that purpose; for instance, actuating of the locks with reference to navigation, the lighting of villages, or many other things of that kind, that give it the right to use electrical energy. If there is a surplus, recognizing the impossibility of making the exact amount of electric power to cover the needs, it has an implied right to sell any power created over and above that, provided that surplus is legitimately created."

ARGUMENT.

There is no doubt that the City of Florence as a municipality is under the statutes and constitution of Alabama authorized to engage in the business of the manufacture and distribution of electric power, nor that it is authorized and empowered to borrow money to construct distribution systems nor that federal lending agencies have the right to make loans for such a purpose. These elements are declared in the opinion of the District Court and the authority of the City is upheld in the late case of **Oppenheim v. City of Florence**, 155 So. 859.

The bill is multifarious as to the City of Florence and the City's motion to dismiss should have been sustained. The motion is carried at record page 275 and the decree overruling it is shown at page 371.

Equity Rule 26 is as follows:

> "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appears that any such causes of action cannot be conveniently disposed of together, the Court may order separate trials."

A bill cannot be sustained in equity which is multifarious and embraces distinct matters affecting distinct parties who have no common interest in distinct matters.

West v. Randell, Fed. Case No. 17,424;

Walker v. Powers, 104 U. S. 245, 26 Law Ed. 729;
Security Savings Association v. Buchannon, 66 Fed. 799;
Howard v. Luce, 171 Fed. 584.

The weight of the attack in this case, and the matter had been involved in other litigations before the Public Service Commission of Alabama, was against a proposed sale of transmission lines and distribution systems by Alabama Power Company to Tennessee Valley Authority. The bill seeks an annulment of those contracts. The questions as to whether the City of Florence may buy power from Tennessee Valley Authority, or may construct a distribution system, or may engage in the power business, or whether the Tennessee Valley Authority may under the Constitution of the United States sell power to the City of Florence, make wholly different and unrelated items. The City is not concerned with the purchase contracts between Tennessee Valley Authority and Alabama Power Company. It ought not to be forced to litigate that question. It is not a necessary or proper party to a bill that seeks the annulment of contracts declared to be ultra vires.

If Alabama Power Company or its stockholders are entitled to enjoin the engagement of Florence in the utility business, or a PWA loan and grant to Florence, that is a wholly separate and distinct piece of business entitled to be tried in a separate lawsuit. As already pointed out in this memorandum, the trial court, while declining defendant's motion to dismiss the bill, recognized the distinction in the alleged causes of action and declared that it would give relief only as against ultra vires the contract case.

This case presents, if any cause does, a multifarious

complaint against which relief should have been granted by the Court on motion.

The final decree is erroneous in enjoining a PWA loan and grant to the City of Florence.

Item 5 of the final decree (Rec., p. 385) makes the following judgment:

> "The defendant municipalities, all of which, or the inhabitants of which, were supplied or served with electricity by Alabama Power Company on and prior to January 4, 1934, are hereby enjoined and restrained from entering into or performing any contract with Tennessee Valley Authority for the purchase from the latter directly or indirectly of energy to be created or acquired and transmitted or delivered by Tennessee Valley Authority, the Federal Emergency Administration of Public Works or any other agency of the United States, for the purpose of constructing a public distribution system for the distribution of electric power to be supplied by Tennessee Valley Authority, directly or indirectly."

The bill shows on its face that stockholders of Alabama Power Company did not request the corporation to bring any action for such relief, and there is no evidence in the record to indicate such a demand. The bill does not pray for such relief. It was the thought of complainant as disclosed in the bill that the City of Florence was about to engage itself with Tennessee Valley Authority in a power program on a schedule of rates that was objectionable to complainants, and with the notion of establishing a basis of power costs that is known as a yardstick. It appears from the bill that complainants feared and sought relief against such a rate structure on the part of the City

of Florence. Drawing the conclusion from the face of the bill, it is plain that George Ashwander et al. never did have it in mind that the City of Florence would be guilty of a legal wrong in borrowing money from PWA, in constructing a power system, in buying power from Tennessee Valley Authority, or in distributing power. The wrong that Mr. Ashwander thought about was in having the City assist Tennessee Valley Authority in making a yardstick which he thought would reflect injuriously on the rates of his own company.

The relief granted has gone far beyond the scope of the original bill and the evidence and any thought of complainants. It has gone beyond the scope of the Court's own declaration in the early parts of the trial.

There is no occasion to insist here on the legal right of PWA to make a loan and grant to Florence, or on the legal right of Florence to construct a power system and engage in the power business. Those items have been ascertained and declared by the trial court, as pointed out above.

It is the City's contention now that, in addition to all the reasons already asserted against a recovery by complainants here, there should be no permanent injunction against a PWA loan by Florence, and its construction of a power system. Such engagements are wholly legal. And the Court has found and pointed out herein that there is always a surplus of power in the operation of Wilson Dam. There is no legal reason why that legitimate surplus (no matter what it may be ascertained to be hereafter) should not be made serviceable to the inhabitants of Florence through the City's engagement in the power business along the lines of its present contracts.

If any court should hold the rate schedule illegal (as claimed in the bill), then injunctive process should be directed at that feature only. Surely it is outside the law to enjoin the City from any PWA loan which will construct a power system for Florence when the power purchases of the town may be on a basis definitely legal.

Respectfully submitted,

W. H. MITCHELL,
City Attorney,
Solicitor for Respondent, City of Florence.